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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/604,928	08/27/2003	James Maxwell	1391-1602	1927
28455	7590	10/09/2007	EXAMINER	
WRIGLEY & DREYFUS 28455			ROBERTS, LEZAH	
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	10/604,928	MAXWELL ET AL.
	<b>Examiner</b>	<b>Art Unit</b>
	Lezah W. Roberts	1614

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 21 May 2007.
- 2a) This action is FINAL.                            2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 71-88 and 90-136 is/are pending in the application.
- 4a) Of the above claim(s) 71-88,90-99 and 121-125 is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 100-120 and 126-136 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) All    b) Some \* c) None of:
    1. Certified copies of the priority documents have been received.
    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## DETAILED ACTION

### ***Restriction Requirement***

Restriction to one of the following inventions is required under 35 U.S.C. 121:

- I. Claims 71-88 and 90-99, drawn to a method of oral cleansing, classified in class 433, subclass 216.
- II. Claims 100-136, drawn to a chewing gum or confectionery product, classified in class 424, subclass 48 plus.

The inventions are distinct, each from the other because of the following reasons:

Inventions I and II are related as product and process of use. The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process of using that product. See MPEP § 806.05(h). In the instant case the chewing gum or confectionary product may be used to ward off hunger or relieve a food craving.

Because these inventions are independent or distinct for the reasons given above and there would be a serious burden on the examiner if restriction is not required because the inventions have acquired a separate status in the art in view of their different classification, because the inventions require a different field of search (see MPEP § 808.02), and because the inventions have acquired a separate status in the art due to their recognized divergent subject matter, restriction for examination purposes as indicated is proper.

The examiner has required restriction between product and process claims.

Where applicant elects claims directed to the product, and the product claims are subsequently found allowable, withdrawn process claims that depend from or otherwise require all the limitations of the allowable product claim will be considered for rejoinder.

All claims directed to a nonelected process invention must require all the limitations of an allowable product claim for that process invention to be rejoined.

In the event of rejoinder, the requirement for restriction between the product claims and the rejoined process claims will be withdrawn, and the rejoined process claims will be fully examined for patentability in accordance with 37 CFR 1.104. Thus, to be allowable, the rejoined claims must meet all criteria for patentability including the requirements of 35 U.S.C. 101, 102, 103 and 112. Until all claims to the elected product are found allowable, an otherwise proper restriction requirement between product claims and process claims may be maintained. Withdrawn process claims that are not commensurate in scope with an allowable product claim will not be rejoined. See MPEP § 821.04(b). Additionally, in order to retain the right to rejoinder in accordance with the above policy, applicant is advised that the process claims should be amended during prosecution to require the limitations of the product claims. **Failure to do so may result in a loss of the right to rejoinder.** Further, note that the prohibition against double patenting rejections of 35 U.S.C. 121 does not apply where the restriction requirement is withdrawn by the examiner before the patent issues. See MPEP § 804.01.

### ***Election of Species***

This application contains claims directed to the following patentably distinct species: of a confectionery product such as chewing gum.

The species are independent or distinct because a chewing gum requires a gum base and a hard candy does not.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claims 90 and 118 generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which depend from or otherwise require all the limitations of an allowable generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species. MPEP § 809.02(a).

During a telephone conversation with Steven Shurtz on September 12, 2007 a provisional election was made without traverse to prosecute the invention of Group II, claims 100-136. Affirmation of this election must be made by applicant in replying to this Office action. Claims 71-88, 90-99, and 121-125 are withdrawn from further

consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

### ***Claims***

#### **Claim Rejections - 35 USC § 112 - Indefiniteness**

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 128 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The claims uses the abbreviation CPC without first defining what CPC stands for or disclosing its definition in the specification.

#### **Claim Rejections - 35 USC § 102 - Anticipation**

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

1) Claims 118 and 131-133 are rejected under 35 U.S.C. 102(b) as being anticipated by Wienecke et al. (US 4,626,427).

Wienecke et al. disclose compositions comprising cardamom seed in a preparation for treating bad breath. The compositions comprise sugar, water and peppermint oil, which comprises menthol (see Example 2). The compositions are formulated into dragee pearls or chewing bon bons (col. 1, lines 45-53). Cardamom oil is extracted from cardamom seeds and therefore cardamom oil is in the compositions<sup>1</sup>. The reference anticipates the claims insofar as it discloses a confectionary product comprising a sweetener, a flavor and cardamom oil.

2) Claims 100-104, 105-107, 111-120 and 129-136 are rejected under 35 U.S.C. 102(e) as being anticipated by Hyodo et al. (US 6,537,595).

Hyodo et al. disclose chewing gum compositions comprising a gum base and essential oils as flavorings. The oils include cardamom oil (col. 5, lines 18-23). The

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<sup>1</sup> A) Esoteric Oils, <http://www.essentialoils.co.za/essential-oils/cardamom.gtm> pages 1-5. The yield of cardamom oil from the seed ranges from 1-5%.

B) Parry, E. J., Chemistry of Essential Oils and Artificial Perfumes, second edition, Scott, Greenwood & Son; London. Pages 194-202.

flavorings are granulated by different granulation techniques including spray-dried granulation. The flavoring is mixed with other materials such as acids including citric, lactic, malic and tartaric acid; and then granulated; therefore the flavoring is encapsulated within the other components (col. 2, lines 18-45). The flavoring granules comprise 0.01 to 5% of the compositions. Based on the examples, with water the flavoring comprises 10% of the granule and without water 25% of the granule. It is calculated the flavoring comprise from about 0.001% to 1.25% of the chewing gum composition. The flavorings may be used alone or in combinations of two or more. When peppermint is used, menthol is also in the compositions. The chewing gums also comprise sweeteners such as aspartame, flavorings and colorants (col. 6, lines 6-49). It is concluded that these flavorings are in addition to the granules. Different types of chewing gums may be prepared. Other components such as dental plaque inhibiting enzymes dental plaque formation inhibiting components may also be included in the compositions. The reference anticipates the instant claims insofar as it discloses a chewing gum comprising a sweetener, a flavor and cardamom oil.

3) Claims 100-103, 105, 111-120, 126, 128-129 and 131-136 are rejected under 35 U.S.C. 102(e) as being anticipated by Hirose et al. (US 5,149,521).

Hirose et al. disclose oral compositions comprising (A) an easily breakable granule; (B) a menthol and/or a natural substance containing menthol; and (C) a flavoring component. The oral compositions may be formulated into chewing gums (col.

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5, lines 50-55 and claim 5). The flavoring components (C) include cardamom oil (See example 3) and comprise 1 ppm to 10% of the flavoring composition (which is at the most 1% of the total composition). The flavoring composition comprises 0.1% to 10% of the oral compositions. Component (B) includes peppermint oil. Other components include sweetening agents such as sorbitol. Component (A) may include glycyrrhetic acid and salts thereof, quaternary ammonium salts, sodium chloride, chlorohexyidine, zinc salts, phosphate such as sodium metaphosphate and calcium pyrophosphate, and organic acids (col. 2, line 50- col. 4, line 25). The reference anticipates the claims insofar as it discloses a chewing gum comprising a sweetener, a flavor and cardamom oil.

#### Claim Rejections - 35 USC § 103 – Obviousness (New Rejection)

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.

4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

1) Claims 100-103, 111-120, 126 and 128-136 are rejected under 35 U.S.C. 103(a) as being unpatentable over Shimada et al. (US 5,626,837).

Shimada et al. disclose oral compositions including chewing gums. The compositions comprise a cationic bactericide including chlorhexidine, triclosan and cetylpyridinium chloride (CPC); and oil-solubilized flavorings including cardamom oil, peppermint oil, menthol and citrus oil. The oils are used alone or in mixtures of two or more (col. 2, lines 20-67). The oils comprise about 0.01 to about 2% by weight of the entire composition. The oral compositions may also comprise sodium fluoride, vitamins and glycyrrhizin salts alone or in mixtures. Sweeteners include acesulfam, taumatin, glycyrrhizin, glycyrrhizin monogluconide, saccharin, and saccharin sodium, alone or in admixture. The pH-adjusting agents include citric acid and its salts (col. 3, line 30 to col. 4, line 30). The reference differs from the instant claims insofar as it does not

disclose how much cardamom oil is in the compositions when mixtures are used or an example of Cardamom in a mixture with other flavoring agents.

Normally, changes in result effective variables are not patentable where the difference involved is one of degree, not of kind; experimentation to find workable conditions generally involves the application of no more than routine skill in the art. In re Aller 105 USPQ 233, 235 (CCPA 1955). It would have been obvious to one of ordinary skill in the art to have added the two flavors in a 1:1 ratio or adjusted the amounts accordingly motivated by the desire to deliver the agents to obtain optimal efficacy to obtain the desired taste or activity, as supported by case law.

2) Claims 108-110 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hyodo et al. (US 6,537,595) in view of Zamudio-Tena et al. (US 4,828,845).

The primary reference, Hyodo et al., is discussed above and discloses the chewing gums may be formulated into different types of chewing gums. The reference differs from the instant claims insofar as it does not disclose the gums are coated.

Zamudio-Tena et al. disclose a xylitol coated chewing gum. The reference is used as a general teaching to disclose flavorings are incorporated into the coatings of coated chewing gums (col. 9, lines 64-67). The gums comprise sweeteners such as acesulfam-K and saccharin. This invention provides a sugarless (e.g., xylitol) coated comestible, whose coating has good appearance, good texture, good flexibility, good film-forming properties and good crunchiness (col. 3, lines 16-20). The reference differs

from the instant claims insofar as it does not disclose the compositions comprise cardamom oil.

It would have been obvious to one of ordinary skill in the art to have used a coated gum compositions as a formulation for the compositions of the primary reference motivated by the desire to form a chewing gum with good appearance, good texture, good flexibility, good film-forming properties and good crunchiness as disclosed by the secondary reference.

3) Claims 100, 104, 106, 111-118 and 127 are rejected under 35 U.S.C. 103(a) as being unpatentable over D'Amelia et al. (US 6,030,605) in view of Wienecke et al. (US 4,626,427) in view of

D'Amelia et al. disclose breath freshening compositions that include chewing gums. Ingesting foods such as onions and garlic may cause the malodor (col. 1, lines 13-15). The compositions comprise zinc compounds such as zinc gluconate, zinc lactate, and zinc citrate, and copper compound, which are effective to ameliorate oral malodor (col. 2, lines 24-40). Sweeteners include aspartame, dihydrochalcone, thaumatin and sucralose. Flavoring such as peppermint oil, menthol and fruit flavors comprises 0.5% to 3% of the compositions (col. 6, line 1-22)). The reference differs from the instant claims insofar as it does not disclose the compositions comprise cardamom oil.

The secondary reference, Wienecke et al., is discussed above. The reference discloses chewing gums are used to fight bad breath. Bad breath caused by onions and

garlic was treated with the cardamom comprising compositions (see Table I). The reference differs from the instant claims insofar as it does not disclose the compositions are chewing gums and comprise zinc gluconate.

Generally, it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose; the idea of combining them flows logically from their having been individually taught in the prior art. In re Kerkhoven, 626 F.2d 846, 850, 205 USPQ 1069,1072 (CCPA 1980); In re Crockett, 279 F.2d 274, 126 USPQ 186 (CCPA 1960). It would have been obvious to one of ordinary skill in the art to have used the cardamom seeds or powders in the compositions, such as chewing gums, of the primary reference motivated by the desire to use a component could enhance the treatment of malodor or bad breath, as disclosed by the secondary reference and supported by cited precedent.

Claims 100-120 and 126-136 are rejected.

No claims allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lezah W. Roberts whose telephone number is 571-272-1071. The examiner can normally be reached on 8:30 - 5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ardin H. Marschel can be reached on 571-272-0718. The fax phone

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number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Lezah Roberts  
Patent Examiner  
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